MASTIKA JAYA TIMBER SDN BHD A

v.

SHANKAR RAM POHUMALL

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG JC
[SUIT NO: 22-229-2009-I]
1 FEBRUARY 2010

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether judgment obtained regular or irregular - Failure to specify judgments entered against defendant - Whether order of court must be precise - Whether judgment should be set aside - Rules of the High Court 1980, O. 19 rr. 2, 3, 4 & 5* C

CIVIL PROCEDURE: *Striking out - Writ of summons and statement of claim - Application for - Filing of two applications for same reliefs - Whether there was duplicity and multiplicity* D

The defendant in this action was an advocate and solicitor of the High Court and a partner in the legal firm of Messrs Thomas, Shankar Ram & Co. He was in this action being sued by his former client, Mastika Jaya Timber Sdn Bhd ('Mastika Jaya') for the refund of a retainer fee of RM200,000 paid in a suit where Mastika Jaya was the defendant. Their claim was premised upon the defendant's alleged incompetence, criminal misconduct and dishonourable conduct in that he had caused Mastika Jaya to affirm an affidavit making scurrilous attacks against the opposing counsels in the said suit. The defendant entered a memorandum of appearance on 23 November 2009 and at the same time filed an application to strike out the plaintiff's writ of summons and statement of claim (encl. 7). But before it was heard, Mastika Jaya obtained a judgment in default of defence against the defendant. Thus by another application, the defendant applied to set aside the judgment in default and had included in that application, prayers for striking out the writ of summons and statement of claim. The issues that arose were (i) whether there was a need to file two applications for the same reliefs and (ii) whether the judgment obtained was a regular or an irregular one. E F G H

Held (allowing the application to set aside judgment in default):

(1) The prayers on the striking out of the pleadings were identical to that found in the earlier application for striking out. There was clearly duplicity and multiplicity in the first application for I

striking out and the present application herein. The inclusion of the prayers on the striking out was bad for duplicity. (paras 2 & 4)

(2) Order 19 rr. 2, 3, 4 and 5 Rules of the High Court 1980 give five instances when a judgment in default of defence can only be entered without leave of the court upon expiry of the time limited for filing the defence. These five instances are where the plaintiff's claim is for a liquidated sum, unliquidated damages, a claim in detinue, a claim for immovable property and finally, when the claim is a mixture of the preceding four claims. However for all other claims in order to enter judgment in default, the plaintiff has to apply for judgment by way of summons or motion. The claim against the defendant herein was a mixture of liquidated sum, unliquidated damages and a declaratory relief. It was therefore caught by O. 19 r. 7(1) of the Rules of the High Court 1980. (para 9)

(3) An examination of the sealed copy of the judgment in default revealed another serious error on the part of the Senior Assistant Registrar who signed it. This judgment was vague as it did not specify what damages had been entered against the defendant, bearing in mind that three different types of damages had been prayed against him. Given that the sealed judgment was the basis upon which a subsequent hearing for assessment of damages or an execution proceeding were founded, the order of the court must be precise in its nature so as to render compliance of the same doable. (para 10)

(4) The judgment entered in default was irregular and must therefore be set aside. This court would therefore allow the application to have it set aside but would in view of the earlier filing of encl. 7 for striking out dismiss the similar prayers in this application. The defendant was given leave to file his defence and accept the statement of defence he had already filed in court so as to save time and cost for all concerned. Lastly, in respect of encl. 7 it is to be heard before High Court III at a later date. (para 12)

Case(s) referred to:

BHR Group Ltd (UK) v. Witech Sdn Bhd & Ors [2004] 3 CLJ 362 HC ***(refd)***

Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd [2005] 4 CLJ 767 CA ***(foll)***

Legislation referred to:
Advocates Ordinance (Sarawak), s. 16(1)
Rules of the High Court 1980, O. 19 rr. 2, 3, 4, 5, 7(1)
Sarawak Advocates (Practice & Etiquette) Rules 1988, r. 56

For the plaintiff - Lim Heng Choo; M/s Lim & Lim Advocates
Anthony Tai; M/s Anthony Tai Advocates
For the defendant - Sunny Si; M/s Si & Associates Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JC:

[1] Mr Shankar a/l Ram Pohumall, the defendant in this action is an advocate and solicitor of the High Court in Sarawak and a partner in the legal firm of Messrs Thomas, Shankar Ram & Co. He is in this action being sued by his former client, Mastika Jaya Timber Sdn Bhd ("Mastika Jaya") for the refund of a retainer fee of RM200,000 paid in a suit where Mastika Jaya was the defendant. Mastika Jaya has also included in its claim other related sums connected to the said suit together with additional prayers on general, aggravated and exemplary damages, interest and cost. Their claim is premised upon Mr Shankar Ram's alleged incompetence, criminal misconduct (in employing a Singapore lawyer to work for him knowing fully well that under s. 16(1) of Advocates Ordinance he should not have done so, as well as making derogatory remarks against YA Datuk Linton Albert who was the judge handling the said suit) and dishonourable conduct in that he had caused Mastika Jaya to affirm an affidavit making scurrilous attacks against the opposing counsel in the said suit.

[2] Mr. Shankar Ram entered a memorandum of appearance on 23 November 2009 through his counsel, Messrs Si & Associates and at the same time filed an application to strike out the plaintiff's writ of summons and statement of claim (encl. 7). Various affidavits were filed in support and in opposition to this application pending the hearing of that application which was fixed on 21 December 2009 but before it was heard and on 14 December 2009 Mastika Jaya obtained a judgment in default of defence against Mr. Shankar Ram. Thus by another application dated 17 December 2009, Mr. Shankar Ram has applied to set aside the judgment in default and has included in that application, prayers for striking out the writ of summons and statement of claim. It is to be observed that the prayers on the striking out of the pleadings are identical to that

found in the earlier application for striking out and I am at loss as to why there is any compelling need or any need at all to file two applications for the same reliefs for it served no purpose other than to confuse and add on to the cost of the proceedings.

[3] Indeed, this very observation of mine forms the basis of Mastika Jaya's preliminary objection at the hearing of this application. The objection also raised the issue of another prayer in the application which is to allow Mr. Shankar Ram to file his defence to the claim. Yet, said counsel for Mastika Jaya, Mr. Lim Heng Choo and Mr. Anthony Tai, he had already done so and this is in fact true. A statement of defence was filed on 17 December 2009, the very same day Mr. Shankar Ram filed this application to set aside the judgment in default and striking out the plaintiff's writ of summons and statement of claim.

[4] I agree with Mastika Jaya's counsel that there is clearly duplicity and multiplicity in the first application for striking out and the present application before me. Whilst I am prepared to modify the prayer on the statement of defence (should I later find merits in the prayer to set aside the judgment in default) ie, to allow the statement of defence filed to remain rather than to order the filing of one afresh, I am not amused by being bombarded with unnecessary prayers especially when, with a little bit of patience, the earlier application will run its own course. There should not be any fear of that application falling by the wayside as the court's computerization system has a monitoring system to alert us should there be a delay of more than a month in disposing off an application from the date of its registration. I agree therefore that the inclusion of the prayers on the striking out is bad for duplicity.

Setting Aside The Judgment In Default

[5] It is trite law that in an application such as this, I first have to decide whether the judgment obtained was a regular or an irregular one. If regular, the defendant has to show a defence on merits but is entitled to set it aside as of right if it is irregular.

Irregular/Regular Judgment

[6] It must first be mentioned that Mr. Shankar Ram did not enter a conditional appearance. His complaint against the judgment was it should not have been entered given that he had filed the striking out application. Secondly, his counsel on record, Messrs Si & Associates was not given a notice under r. 56 of the Sarawak

Advocates (Practice & Etiquette) Rules 1988 and thirdly, under O. 19 r. 7(1) of the Rules of the High Court 1980, Mastika Jaya must apply to the court to enter the judgment.

[7] In respect of having notice of the striking out application, there is no legal requirement imposed on Mastika Jaya's counsel or any plaintiff's counsel for that matter to restrain themselves from entering the judgment in default in the face of such an application. Although there is a requirement under the said r. 56 for notice to be given to Mr. Shankar Ram's counsel before judgment in default is entered, nevertheless, in the joint submission of Mr. Anthony Tai and Mr. Lim Heng Choo, they have drawn my attention to the Court of Appeal's decision in *Sri Minal Construction Sdn Bhd v. Mobil Oil Malaysia Sdn Bhd* [2005] 4 CLJ 767 where it was held that non-compliance with the equivalent Rule in the Legal Profession (Practice and Etiquette) Rules 1978 does not render the judgment in default obtained irregular. Though the decision was for a different Rule, nevertheless the similarity of the intent and purpose of the Rule with the one under consideration by me now makes it a compelling authority to follow. My predecessor in High Court II Kuching, YA Datuk Abdul Aziz bin Abdul Rahim had infact made a decision directly on point ie, *BHR Group Ltd (UK) v. Witech Sdn Bhd & Ors* [2004] 3 CLJ 362 which was in line with the reasonings in *Sri Minal Construction Sdn Bhd*'s case *(supra)*, thereby further strengthening the view I have taken in respect of this issue.

[8] Thus, on the strength of these authorities, I uphold counsel's argument but am constrained, by my reading of O. 19 r. 3 and 7 as well as an examination of the sealed copy of the judgment in default (encl. 23) to accede to Mr. Shankar Ram's contention that the judgment in default entered was indeed irregular.

[9] My reasoning is this. Order 19 rr. 2, 3, 4 and 5 gave 5 instances when a judgment in default of defence can be entered without leave of the court upon expiry of the time limited for filing the defence. These 5 instances are where the plaintiff's claim is for a liquidated sum, unliquidated damages, a claim in detinue, a claim for immovable property and finally, when the claim is a mixture of the preceding four claims. However for all other claims, in order to enter judgment in default, the plaintiff has to apply for judgment by way of summons or motion. The claim against Mr. Shankar Ram in this case is a mixture of liquidated sum, unliquidated damages and a declaratory relief. It is therefore caught by O. 19 r. 7(1). Mastika Jaya's counsel have argued that their judgment was

entered specifically under O. 19 r. 3 as expressly stated in the interlocutory judgment and therefore have not run a foul of O. 19 r. 7(1) but to which I respectfully disagree. Even though the judgment in default entered was only for damages, the very reason why before entering judgment they have to get leave from the court is so that the court can be appraised of the status of the other reliefs prayed in the statement of claim and give directions respecting them - for instance whether Mastika Jaya wishes to abandon these other reliefs or despite no defence being filed, the court would still require them to set the case down for trial in respect of these other reliefs.

[10] Additionally, my examination of the sealed copy of the judgment in default revealed another serious error on the part of the learned Senior Assistant Registrar who signed it. The relevant part of the judgment reads:

> It Is Hereby Ordered that interlocutory judgment be and is entered against the defendant with damages to be assessed and cost to the plaintiff.

This judgment is vague as it did not specify what damages has been entered against Mr. Shankar Ram, bearing in mind that three different types of damages have been prayed against him.

[11] Given that the sealed judgment is the basis upon which a subsequent hearing for assessment of damages or an execution proceeding are founded, the order of the court must be precise in its nature so as to render compliance of the same doable.

[12] For these reasons, I am of the view that the judgment entered in default of defence is irregular and must therefore be set aside. I would therefore allow the application to have it set aside but would in view of the earlier filing of encl. 7 for striking out dismiss the similar prayers in this application. I agree to give Mr. Shankar Ram leave to file his defence and accept the statement of defence he has already filed in court so as to save time and cost for all concerned. As for costs of this application, it is only fair that I award no cost to either party in view of the decision I have made in respect of the prayers in the application.

[13] Lastly, in respect of encl. 7 it is to be heard before High Court III on 8 February 2010 at 9am.